No. 82-967

In the Supreme Court of the United States

OCTOBER TERM, 1982

LEE ISENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court properly charged the jury concerning evaluation of petitioner's testimony.

2. Whether the trial court was required to submit the question of materiality to the jury in a prosecution of petitioner for making false statements in violation of 18 U.S.C. 1001.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1982. The petition for a writ of certiorari was filed on December 10, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes

any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement, or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted of conspiracy, in violation of 18 U.S.C. 371 (Count 1); theft of funds and assets that were the subject of grants and contracts of assistance funded under the Comprehensive Employment and Training Act of 1973 ("CETA"), in violation of 18 U.S.C. 665 and 2 (Counts 2-33); and making false statements on invoices submitted in connection with CETA-funded programs, in violation of 18 U.S.C. 1001 (Counts 34-58).[1] He was sentenced to concurrent terms of three years' imprisonment on Count 1 and two years' imprisonment on each of Counts 2-58. The sentences were to be suspended after petitioner served 90 days, following which he was to be placed on probation for a period of two years. Petitioner was also fined $10,000 on Count 1 and $5,000 on each of Counts 2 through 5, for a total fine of $30,000. The court of appeals affirmed.

1. The evidence at trial established that from October 21, 1975, to the end of 1979, petitioner controlled and supervised the activities of four nonprofit corporations that received approximately $2 million in federal funds under the Comprehensive Employment and Training Act of 1973, 29 U.S.C. 801 *et seq.* The funds were earmarked for job

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[1] Petitioner's co-defendant, Edward Isenberg, was convicted on 17 of the 58 counts, but the district court thereafter granted his motion for a judgment of acquittal. The court denied petitioner's motion for a judgment of acquittal.

training of unemployed and underemployed persons in the food service industry. During the same period, petitioner was president of Lee Isenberg Associates, Inc. ("LIA"), a trade association management firm serving the Associated Restaurants of Connecticut, among other clients (Tr. 2102-2104, 2132, 2286, 2358, 2495, 3420-3422, 3495; GX 112).[2]

By using cash fraudulently generated within the CETA-funded corporations, petitioner was able to "absorb" $400,000 to $500,000 in expenses incurred by LIA (Tr. 2369, 2495, 2816). These expenses included part or all of the salaries of 14 employees of LIA (Tr. 1948-1958, 2017, 2268, 2286, 2358, 2363, 2534, 2889-2892; GX 2-33, 117). These "absorptions" of LIA expenses constituted the thefts charged in Counts 2-33 of the indictment. The fraudulent documents used in generating the funds included false invoices submitted to CETA prime sponsors, CETA intake forms, and internal records of the CETA-funded corporations. Submission of the false invoices, which were prepared and submitted at petitioner's direction, resulted in payment of the salaries of the 14 employees of LIA from CETA grant funds by checks drawn against the payroll accounts of the CETA-funded corporations (Tr. 599, 619, 674-676, 753-766, 841, 851, 869, 889-893, 1328-1329, 2409-2494, 2618-2623, 2812; GX 2-58). The false statements contained in these documents formed the basis of Counts 34-58 of the indictment.

During 1976 through 1978, the employee payroll absorption scheme alone created an illegal benefit to LIA of approximately $208,000 by saving it the cost of the salaries of the 14 employees. Of that amount, $36,000 per year was transferred to Lee Isenberg Associates Training Services,

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[2] "Tr." refers to the transcript of the trial of petitioner and Edward Isenberg.

which served as petitioner's personal checking account. Petitioner caused an additional $9,000 per year to be diverted to New Horizon Developments, Inc., which in turn was a conduit for distributing money to petitioner's wife. The balance of the funds was distributed to the four partners of LIA, with more than half going to petitioner (Tr. 2513-2516, 2542-2583, 2613-2620, 2725-2726, 2784, 2928-2938, 2962-2990, 3593-3596, 3725-3728; GX 77-78, 124-125).

2. The district court charged the jury that the "law presumes a defendant to be innocent of crime" (Tr. 3769-3770). The court also charged the jury in a comprehensive manner concerning evaluation of the credibility of witnesses (Tr. 3805-3816). In the charge the court warned that the testimony of an accomplice witness who testifies for the government should be "received with caution and considered with great care" (Tr. 3811), that the testimony of an immunized government witness "should be examined * * * with greater care than the testimony of an ordinary witness" because the promise of immunity may provide "a motive to falsify" (Tr. 3812), and that the prior felony conviction of another witness could be considered in determining his credibility (Tr. 3810). The district court explained (Tr. 3809-3810) that "[a]ll evidence of a witness whose self-interest or attitude is shown to be such as might tend to prompt testimony unfavorable to the accused, should be considered with caution and weighed with great care."[3]

Thereafter, the court gave the following charge regarding petitioner's credibility (Pet. App. 6a; Tr. 3812-3813):

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[3]The district court further charged the jury that the testimony of a law enforcement officer "is entitled to no special or exclusive sanctity * * * you should not believe him merely because he is a law enforcement officer. You should evaluate his testimony, as you do that of any other witness." (Tr. 3815).

> With respect to the defendants, Edward Isenberg and Lee Isenberg, who testified, you must carefully consider the testimony of each. An accused person is not obligated to take the witness stand in his own behalf. On the other hand, he has a perfect right to do so, as the defendants have done here.
>
> In weighing the testimony each has given, you should apply the same principles by which the testimony of the other witnesses is tested, including the witnesses called by the Government. That necessarily involves a consideration of the interest each defendant has in the case. An accused person, having taken the witness stand, is before you just like any other witness. He is entitled to the same considerations, and may have his testimony measured in the same way as any other witness, including his interest in the verdict which you are called upon to render.
>
> However, I want to say this with equal force to you: It by no means follows that simply because a person has a vital interest in the end result of the trial, that he is not capable of telling a truthful and straightforward story.
>
> It is for you to decide to what extent, if at all, the defendants' interest have affected or colored their testimony.

The district court also instructed the jury concerning the elements of the crimes charged in the indictment (Tr. 3783-3803). In connection with the counts charging violations of 18 U.S.C. 1001 (Counts 34-58), the court charged the jury (Pet. App. 6a; Tr. 3802):

> The making of a false statement to an agency of the United States Government is not an offense, unless the statement made is a material statement. The issue of

materiality, however, is not submitted to you for your decision, but rather is a matter for the decision of the Court. You are instructed that the statements charged in the indictment are material statements.

3. The court of appeals affirmed (Pet. App. 1a-5a). It rejected petitioner's argument that the district court erred in instructing the jury regarding petitioner's testimony. The court of appeals noted (*id.* at 4a) that "[t]he court was careful to emphasize the jury should not conclude 'that simply because a person has a vital interest in the end result of the trial, that he is not capable of telling a truthful and straightforward story.' " Therefore, the instruction "did not affect the presumption of innocence" (*ibid.*). The court of appeals also rejected petitioner's claim that the district court erred in refusing to submit the issue of materiality to the jury, stating (*id.* at 5a,●) that "[m]ateriality is a question for the court." [4]

ARGUMENT

1. Petitioner contends (Pet. 13-17) that the district court's charge with respect to evaluation of a defendant's testimony improperly called attention to his interest in the case and thereby destroyed the presumption of innocence to which he was entitled. In addition, petitioner suggests the existence of a conflict among the courts on this question. These claims are insubstantial and do not warrant review by this Court.

When the instructions at issue are examined in the context of the overall charge and in light of the evidence and arguments at trial (see, *e.g.*, *United States* v. *Park*, 421 U.S.

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[4]The court of appeals concluded also (Pet. App. 1a-5a) that the evidence was sufficient to support petitioner's conviction and that the district court properly instructed the jury with respect to evaluation of accomplice testimony and the elements of the crime of conspiracy. Petitioner does not challenge these holdings before this Court.

658, 674-676 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973)), it is clear that they were entirely proper. There can be no doubt "that a testifying defendant has more to gain and less to lose than an ordinary witness from fabrications upon the witness stand." *Doyle* v. *Ohio*, 426 U.S. 610, 629 n.8 (1976) (Stevens, J., dissenting). Accordingly, it has long been recognized that a trial judge may properly call to the jury's attention the special interest of a testifying defendant. This Court so held in *Reagan* v. *United States*, 157 U.S. 301, 305 (1895) (emphasis added):

> It is within the province of the court to call the attention of the jury to any matters which legitimately affect [a defendant's] testimony and his credibility. This does not imply that the court may arbitrarily single out his testimony and denounce it as false. The fact that he is a defendant does not condemn him as unworthy of belief, but at the same time *it creates an interest greater than that of any other witness, and to that extent affects the question of credibility. It is, therefore, a matter properly to be suggested by the court to the jury.* [5]

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[5]Petitioner's reliance (Pet. 14-15) on several decisions of this Court is misplaced. The Court in *Wilson* v. *United States*, 162 U.S. 613, 621 (1896), merely observed that the trial judge properly refrained from instructing the jury "to treat the testimony of defendant in a manner different from that in which they treated the testimony of other witnesses, and left it to them to give to his evidence, under all the circumstances affecting its credibility and weight, such consideration as they thought it entitled to receive." That observation is fully consistent with the charge approved by the court below. The other cases on which petitioner relies are also consistent with the instruction in this case, since they hold simply that a court may not suggest or express its opinion that the defendant's testimony is untruthful. See *Quercia* v. *United States*, 289 U.S. 466, 471-472 (1933); *Allison* v. *United States*, 160 U.S. 203, 207, 209-210 (1895); *Hicks* v. *United States*, 150 U.S. 442, 452 (1893). As the Court recognized, " '[i]t is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices, and,

The Court went on to state that "the court may, and sometimes ought, to remind the jury * * * that the interest of the defendant in the result of the trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony." 157 U.S. at 310.

The courts of appeals have repeatedly upheld instructions that specifically direct the attention of the jury to a testifying defendant's interest in the case. See, *e.g.*, *United States* v. *Ylda*, 643 F.2d 348, 352 (5th Cir. 1981); *United States* v. *Anderson*, 642 F.2d 281, 286 (9th Cir. 1981); *United States* v. *Floyd*, 555 F.2d 45, 47 & n.4 (2d Cir.), cert. denied, 434 U.S. 851 (1977); *United States* v. *Figurski*, 545 F.2d 389, 392 (4th Cir. 1976); *United States* v. *Wright*, 542 F.2d 975, 985-986 (7th Cir. 1976), cert. denied, 429 U.S. 1073 (1977); *United States* v. *Hill*, 470 F.2d 361, 363-365 (D.C. Cir. 1972); *United States* v. *Rutkin*, 189 F.2d 431, 439 n.6 (3d Cir. 1951), aff'd on other grounds, 343 U.S. 130 (1952); see also *United States* v. *Morrone*, 502 F. Supp. 983, 991-993 (E.D. Pa. 1980), aff'd without opinion, 672 F.2d 905 (3d Cir. 1981), cert. denied, 455 U.S. 941 (1982).[6]

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perhaps, a judge cannot be considered as going out of his province in giving similar caution as to the testimony of the accused person.' "*Allison* v. *United States*, *supra*, 160 U.S. at 207, quoting *Hicks* v. *United States*, *supra*, 150 U.S. at 452.

[6]Thus, the holding of the court below with respect to the instruction on a defendant's testimony is in accord with the great weight of authority. Petitioner relies (Pet. 15) on several Eighth Circuit cases in which that court has indicated that it does not favor an instruction "singling out" a defendant. However, those cases do not present a significant conflict requiring review by this Court. Notably, the Eighth Circuit has not found that such instructions constitute cause for reversal when viewed in light of the evidence and the context of the charge as a whole. See *United States* v. *Standing Soldier*, 538 F.2d 196, 204 (8th Cir.), cert. denied, 429 U.S. 1025 (1976); *United States* v. *Bear Killer*, 534 F.2d 1253, 1260 (8th Cir.), cert. denied, 429 U.S. 846 (1976); *United*

Here the court instructed the jury concerning the presumption of innocence applicable to petitioner. In addition, the court stressed that " [i]t by no means follows that simply because a person has a vital interest in the end result of the trial, that he is not capable of telling a truthful and straightforward story," and that petitioner's testimony was to be evaluated "in the same way as any other witness" (Pet. App. 6a). Moreover, the instruction was given in the context of a comprehensive charge regarding the credibility of witnesses, including specific cautionary instructions concerning the testimony of accomplices, convicted felons, and immunized government witnesses. Thus, the charge on witness credibility was balanced, accurate, and even-handed. Under those circumstances, the court of appeals properly concluded (*id.* at 4a) that the instruction at issue "did not affect the presumption of innocence."

2. Petitioner further contends (Pet. 17-20) that the district court erred in not submitting to the jury the question of the materiality of his false statements made in the invoices used to generate CETA funds fraudulently. He acknowledges (Pet. 17) that the court of appeals followed the "well settled" rule in the Second Circuit that "materiality is a question for the court" in a prosecution for violation of 18 U.S.C. 1001, but suggests (Pet. 18-20) that this rule conflicts with the practice of certain other circuits. That contention does not warrant further review.

We note initially that petitioner's contention has no relation to the theft counts and that his sentence does not meaningfully depend on his conviction for the violations of

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States v. *Brown*, 453 F.2d 101, 107 (8th Cir. 1971), cert. denied, 405 U.S. 978 (1972).

Petitioner also suggests (Pet. 16-17) the existence of a conflict among state courts on this point. Such a conflict would not warrant this Court's attention.

18 U.S.C. 1001 (Counts 34-58). No fine was imposed with respect to those false statement counts, and his sentences on them are otherwise equal to and concurrent with the sentences on the theft counts.

Petitioner cites no case in which a court has overturned a conviction under 18 U.S.C. 1001 on the ground that the issue of materiality was not submitted to the jury, and we are aware of none.[7] Our research has disclosed decisions of

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[7]Contrary to petitioner's suggestion, the great weight of authority among the circuits is consistent with the view of the courts below (Pet. App. 5a) that the issue of materiality under 18 U.S.C. 1001 is for the court to determine. See, *e.g.*, *United States* v. *McIntosh*, 655 F.2d 80, 82 (5th Cir. 1981); *United States* v. *Adler*, 623 F.2d 1287, 1292 (8th Cir. 1980); *United States* v. *Bernard*, 384 F.2d 915, 916 (2d Cir. 1967); *United States* v. *Ivey*, 322 F.2d 523, 529 (4th Cir.), cert. denied, 375 U.S. 953 (1963); *United States* v. *Clancy*, 276 F.2d 617, 635 (7th Cir. 1960); *Weinstock* v. *United States*, 231 F.2d 699, 703 (D.C. Cir. 1956); see also 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 28.09 (1977 ed. & 1980 Pocket Part). Moreover, this Court has recognized that the materiality of false statements generally is a question for the court. In *Sinclair* v. *United States*, 279 U.S. 263, 298 (1929), construing the pertinency requirement of a statute proscribing refusal to answer questions by congressional committees, the Court stated:

> The question of pertinency * * * was rightly decided by the court as one of law. It did not depend upon the probative value of evidence. That question may be likened to those concerning relevancy at the trial of issues in court, and it is not essentially different from the question as to materiality of false testimony charged as perjury in prosecutions for that crime. Upon reasons so well known that their repetition is unnecessary it is uniformly held that relevancy is a question of law. * * * And the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court.

Most of the cases on which petitioner relies (Pet. 18-19) simply state that materiality is an essential element of 18 U.S.C. 1001. See, *e.g.*, *United States* v. *Voorhees*, 593 F.2d 346, 349 (8th Cir.), cert. denied, 441 U.S. 936 (1979); *United States* v. *Talkington*, 589 F.2d 415, 416 (9th Cir. 1979); *United States* v. *Radetsky*, 535 F.2d 556, 571 (10th Cir.), cert. denied, 429 U.S. 820 (1976); *Freidus* v. *United States*, 223 F.2d 598, 601-602 (D.C. Cir. 1955); *Rolland* v. *United States*, 200 F.2d

two courts of appeals that indicate approval of the practice of submitting questions of materiality to the jury under 18 U.S.C. 1001. See *United States* v. *Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *United States* v. *Valdez*, 594 F.2d 725, 729 (9th Cir. 1979); *United States* v. *East*, 416 F.2d 351, 355 (9th Cir. 1969); *Gonzales* v. *United States*, 286 F.2d 118, 122 (10th Cir. 1960), cert. denied, 365 U.S. 878 (1961). But only two of these cases involved a finding that failure to submit the issue of materiality to the jury constituted error, and in both cases the court concluded that the convictions nevertheless should be affirmed because materiality had been so clearly established. See *United States* v. *Valdez*, *supra*, 594 F.2d at 729; *United States* v. *East*, *supra*, 416 F.2d at 353-355 (no prejudice from failure to instruct jury that materiality is an essential element since under the circumstances the materiality of the representations was established as a matter of law).

Here, there can be no doubt that petitioner's false statements in invoices submitted under the CETA program were material, *i.e.*, that they "could affect or influence the exercise of governmental functions" and had a "natural tendency to influence * * * agency decision," *United States* v. *Carrier*, 654 F.2d 559, 561 (9th Cir. 1981). Petitioner does not contend otherwise. See also *United States* v. *Voorhees*, 593 F.2d 346, 350 (8th Cir.), cert. denied, 441 U.S. 936 (1979) (defendant who applied for and received illegal payments is not in a position to assert that his false

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678, 679 (5th Cir.), cert. denied, 345 U.S. 964 (1953). That conclusion is consistent with the instruction given in this case (see pages 5-6, *supra*). See also *Johnson* v. *United States*, 410 F.2d 38, 46 (8th Cir.), cert. denied, 396 U.S. 822 (1969) (stating that questions of materiality are for the trial court in a prosecution under 18 U.S.C. 287, but indicating that the issue of materiality in fact had been submitted to the jury).

statement was not material on the ground that it was incapable of producing illegal payments). Under the circumstances of this case, there is no basis for believing that any other court of appeals would have granted petitioner the relief he seeks. Thus, to whatever extent a conflict may exist, the present case does not provide an appropriate occasion for this Court to address it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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